

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2137

To Be Argued By
NANCY B. BENSAL

*original
affidavit
B service*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/s

LEON BUSH,

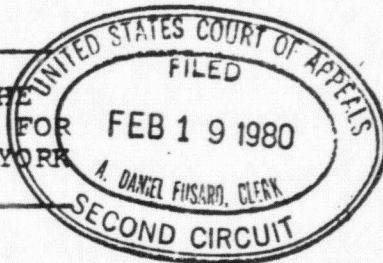
Petitioner-Appellant,

-against-

DAVID R. HARRIS, Superintendent, Green Haven
Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-2137

LEON BUSH,

Petitioner-Appellant,

-against-

DAVID R. HARRIS, Superintendent, Green Haven
Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Pratt, J.), dated August 7, 1979. On March 2, 1978, this case was remanded to the District Court, by a panel of this Court (Anderson, Feinberg and Timbers, C.J.J.) for further consideration of the

notice-of-alibi issue. Judge Pratt adhered to his previous decision of May 23, 1977 and dismissed petitioner's application for a writ of habeas corpus finding no actual prejudice to the petitioner resulting from a lack of notice of the identity of the three rebuttal witnesses.

Questions Presented

1. Has petitioner so radically changed his argument before this Court so that his appeal should be dismissed for failure to present his argument to the Court below on his first application and for failure to exhaust his State remedies?

2. Has petitioner suffered any actual prejudice by operation of New York's former notice-of-alibi statute?

3. Should Wardius v. Oregon not be applied retroactively to this case?

4. Does the traditional harmless error test preclude the application of Wardius v. Oregon to petitioner?

Statement of Facts

Petitioner is presently incarcerated pursuant to a judgment of conviction of the Supreme Court, Kings County (Barshay, J.), entered on September 22, 1971. He was convicted, after a trial by jury, of the crimes of felony murder and

manslaughter in the second degree. He was sentenced to concurrent indeterminate sentences of fifteen years to life on the felony murder and a maximum of fifteen years on the manslaughter charge.

The conviction was affirmed by the Second Department, 40 A D 2d 591 (1972) and the Court of Appeals, 33 N Y 2d 921 (1973), motion to amend remittitur granted, 34 N Y 2d 537 (1974) cert. den. 419 U.S. 848 (1974).

A motion for a writ of error coram nobis was denied by the Supreme Court, Kings County (Brownstein, J.) on April 13, 1976, motion to reargue denied May 24, 1976, leave to appeal denied July 20, 1976.

State Trial Court Proceedings

A. The Huntley Hearing

The Huntley hearing* was held immediately before the trial, on May 3, 1971. Detective Donald McCarthy testified that he arrested petitioner on February 17, 1970 (3).**

* Held pursuant to People v. Huntley, 15 N Y 2d 72 (1965) to determine the voluntariness of petitioner's confession.

** Page references are to the trial transcript which has been previously supplied to this Court.

Petitioner was charged with the August 30, 1969 killing of Robert Wheeler.

Leon Bush identified himself as Donald Bush and claimed that he had just been released from the Brooklyn House of Detention (5). Bush was advised of his constitutional rights in the police car (36) and at the station house (6-8). He claimed that he had a brother named Leon Bush (10).

After being shown some identifying information from the New Orleans Police Department, Bush admitted his identity (14-16) and soon stated "Do you want to know about the stabbing?" (17).

Petitioner then stated that he and his cousin had seen a "whiteman" near a "record shop" (18) whom they followed until he turned around with a knife in his hand. Petitioner then drew his knife and told the victim that he wanted all of his money. "The deceased then raised his hand with his knife, and that is when I stabbed him in the side. The deceased then backed up across the street, and I went through his pockets and stabbed him again" (19).

Bush took the victim's watch and secreted his murder weapon in a vacant apartment (19). After the oral

confession was given, Bush agreed to reduce it to writing, and the District Attorney's office was notified (20). The written confession was signed (23) and received into evidence.

Two other Detectives, the Hearing Reporter who transcribed the confession, and the Assistant District Attorney who took the written confession, testified that Bush was not mistreated (85, 104, 117-18, 130).

Bush testified that he was advised of his rights in the car (151) and that he was beaten (156-60, 197).

On rebuttal, a Correction Officer at the Department of Corrections and the Physician for the Department testified that Bush showed no signs of a beating (214-16, 225-38).

The court rendered an oral decision finding that Bush's confessions were voluntary (245-47).

Following jury selection, petitioner moved to set aside New York's notice-of-alibi statute* on the ground that

* The Code of Criminal Procedure, § 295-1, restated in Criminal Procedure Law § 250.20, effective September 1, 1971, and revised to comply with People v. Bush, supra, see Appendix C at 16-17, the text of CCF § 295.1.

it did not provide for reciprocal discovery. No specific claim of prejudice was made (265-268). The prosecutor pointed out that his rebuttal witnesses were known to Bush (267-68). The motion was denied (268).

B. The Trial

Various witnesses testified to the finding of the victim, his death from a stab wound in the chest, the identification of the victim, the arrest of Bush, and Bush's confession (296-434).

Petitioner presented an alibi defense through the reading into the record of interrogatories conducted in New Orleans, Louisiana, under the auspices of a Commissioner. Five relatives of Bush testified, through those interrogatories, that he was in New Orleans at the time of the murder (455-514).

Petitioner's brother Donald, as well as petitioner, testified at the trial that petitioner was in New Orleans at the time of the murder (518-545). Bush also claimed again that his confession had been extracted from him (599-61).

The people presented a number of witnesses to contradict Bush's claim that his confession had been beaten out of him (594-610, 656-84).

Three witnesses were then presented to rebut petitioner's alibi. Frank Rawitz owned a bar frequented by Bush for whom he had cashed a check in August, 1969, the month of the murder. The check on August 26, 1969, the day before Bush had claimed to be in New Orleans. The check, endorsed by Bush, was placed in evidence. There was no cross-examination (610-612a).

Della Curtis, a licensed practical nurse, testified that she and her husband ran a boarding house at which petitioner lived from July through the middle of September, 1969 (T. 621-24).

Mrs. Curtis was extensively cross-examined (624-33, 634-35).

Miller Curtis testified to seeing Bush frequently during July, August and September, 1969, both at his boarding house and at Mr. Rawitz' bar where he, Miller, worked (635-3a). Mr. Curtis also was extensively cross-examined (639-652, 653-54). The notes made by the Assistant District Attorney of his prior conversation with Curtis were turned over to the petitioner (646).

After the testimony of the rebuttal witnesses, petitioner moved to strike their testimony on the ground that they should have been identified to him earlier "so that I could do a better job on cross-examining; although I hope I did a job" (655).

In his summation, after emphasizing the testimony of his alibi witnesses (696-697), petitioner stated:

"I am not going to go into the other alibi witnesses, what we call the defense of non-presence, because I will put my witnesses against these two characters, the Curtis' who came here yesterday, and I will leave that to you to decide how much credence, or as we lawyers call it, how much weight you will give to that type of testimony from those two people who never told anybody about it until two or three weeks ago" (697).

And again (708-09).

Petitioner was convicted. He was sentenced on September 22, 1971.

C. First Level State Appeal

Petitioner's brief to the Appellate Division contains eight points.* The point challenging New York's

* Bush's State appellate briefs and the District Attorney's Appellate Division and Court of Appeals Briefs and opposition to certiorari have been lodged with this Court by the respondent-appellee.

notice-of-alibi statute is two pages (pp. 28-29). There is neither a claim of actual prejudice nor a claim that petitioner's trial attorney would have been able to obtain information for use in cross-examination had he had the names of the alibi rebuttal witnesses prior to trial.

Petitioner's conviction was affirmed without opinion. 40 A D 2d 591 (2d Dept. 1972).

D. Second Level State Appeal

Petitioner's main brief to the New York Court of Appeals also urged eight points upon the Court. The point concerning the notice-of-alibi statute (pp. 27-33) again neither claims nor specifies any prejudice and contains no statement that his trial attorney would have been able to obtain more information for use in cross-examination had he been provided a list of the prosecutor's rebuttal witnesses prior to trial.

After the Supreme Court decided Wardius v. Oregon, 412 U.S. 470 (1973), petitioner submitted an "Addenda to Appellant's Brief of Law and Additional Papers to the Court of Appeals." The brief only points out Wardius v. Oregon, supra, to the Court and provides it with a copy of the opinion.

The Court of Appeals, 33 N Y 2d 921 (1973) held New York's notice-of-alibi statute unconstitutional, but refused to apply its holding retroactively to petitioner since he had not been precluded from introducing his alibi defense. The court stated:

"Per Curiam. We find no significant difference between section 295-1 of the Code of Criminal Procedure, applicable here, and the notice-of-alibi statute of the State of Oregon held unconstitutional by the United States Supreme Court in Wardius v. Oregon (412 U.S. 470). Accordingly we hold section 295-1 unconstitutional.

"We recognize, however, 'the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective"' (Johnson v. New Jersey, 384 U.S. 719, 726). In our view section 295-1 as applied in this instance did not operate to exclude testimony. In response to the District Attorney's demand, defendant here furnished the names of his alibi witnesses. Their testimony was admitted on trial, as was that of the prosecution's rebuttal witnesses. The statute operated only to deny defendant advance notice of the identity of these rebuttal witnesses, and to this extent to hinder his preparation to impeach, discredit or rebut their testimony. He was not however, inhibited in his own opportunity by direct evidence to establish his alibi. The infringement of defendant's rights went only to a collateral though not unimportant issue. Thus, we conclude that on this record the operation of the rule did not go to 'the very integrity of the fact-finding process'; rather it touched on procedural fairness to defendant.

"On the basis of this evaluation we hold that Wardius and our present decision shall apply to cases in which the trial began after June 11, 1973, the date of the Supreme Court decision in Wardius (cf. Linkletter v. Walker, 381 U.S. 618; Tehan v. Shott, 382 U.S. 406; Johnson v. New Jersey, supra; Stovall v. Denno, 388 U.S. 293; see People ex rel. Cadogan v. McMann, 24 N Y 2d 233), but shall not apply to cases where the trial began prior to that date, unless, as occurred in Wardius but unlike the situation here, the rule was applied to prevent a defendant from introducing testimony to support his alibi defense as a sanction for his failure to comply with the notice-of-alibi statute. We do not reach the question as to retroactivity on direct appeal in such cases and leave that determination to another day.

"We have examined appellant's other contentions and find them to be without merit.

"Accordingly the order of the Appellate Division is affirmed."

The Court of Appeals later granted petitioner's motion to amend remittitur, 34 N Y 537 (1974) and amended it by including, inter alia:

"On the appeal herein there were presented and necessarily passed upon the following questions under the Constitution of the United States, viz: (1) Does the refusal of the court retroactively to apply the Wardius rule, of unconstitutionality of the New York State notice-of-alibi statute (Code Crim. Pro. § 259-1) to appellant's trial, which commenced and was concluded prior to June 11, 1973, the date of Wardius (ibid.), violate the Fourteenth Amendment to the constitution of the United States?"

This issue was presented by petition for certiorari which was denied. 419 U.S. 848 (1974).

E. T. District Court's First Decision

Petitioner presented eleven questions to the District Court including his notice-of-alibi claim and a claim that his confession was coerced.

The District Court dismissed the petition finding, inter alia, that there was "ample support in an extensive record"* for the State court's finding petitioner's confession was voluntary.

With respect to petitioner's notice-of-alibi claim, the court found:

"The only rebuttal witnesses who contradicted the trial version of Bush's alibi were a Mr. and Mrs. Curtis. They testified that in the summer of 1969 they had rented a room to Bush's cousin, Gerald Richardson, that Bush had shared the room with Richardson during the latter part of the summer, and that Mr. Curtis had been forced to evict Bush and Richardson on September 16, 1969, for failure to pay the rent. Since Bush had previously testified to his

* The memorandum and order constituting Judge Pratt's first decision denying petitioner's application for a writ of habeas corpus has been designated as C of petitioner-appellant's appendix.

presence in New Orleans during the entire month of September, 1969, defense counsel cross-examined both Mr. and Mrs. Curtis. Significantly, however, at no time did defense counsel move for a recess or a continuance in which to prepare his cross-examination of any of the three rebuttal witnesses. See Green v. Fogg, 422 F. Supp. 1034, 1036 (S.D.N.Y. 1976). Nor is there now any allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identity of these witnesses prior to their testimony. See Mayer v. Moeykens, 373 F. Supp. 649, 654 (D. Vt. 1973), *affd.* 494 F. 2d 855 (CA2), *cert. den.* 417 U.S. 926 (1974).

"The test utilized repeatedly by [the Supreme] Court to ascertain whether 'new' constitutional protections in the area of criminal procedure are to be applied retroactively calls for consideration of three criteria: '(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'" Michigan v. Payne, 412 U.S. 47, 51 (1973) (citations omitted).

A. Purpose of the New Standard

"Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." Williams v. United States, 401 U.S. 646, 653 (1971). Had application of the New York notice-of-alibi rule led to Bush's abandoning his alibi defense, the purpose of the Wardius doctrine might well have dictated a new trial, since the trial court's truth-finding function arguably would have been substantially impaired.

See United States ex rel. Hairson v. Warden, 407 F. Supp. 524 (N.D. Ill.), revd. on other grounds 539 F. 2d 713 (CA7 1976); People v. Bush, supra (dictum). Here, however, Bush was not deterred from presenting his alibi defense. Moreover, no continuance was requested, and no specific prejudice was then or has subsequently been alleged. Under such circumstances, the application of the unconstitutional notice provision in Bush's case should not be assumed to have 'substantially' impaired the trial court's truth-finding functions. '[R]etroactivity is not required [merely] by a determination ... that the truth-determining process has been aided somewhat by the new standard....'" Gosa v. Mayden, 413 U.S. 665, 680 (1973).

B. Reliance

"The Wardius doctrine was not clearly forecast by any prior decision of the Supreme Court. Indeed, in Williams v. Florida, 399 U.S. 78, 82 n. 11 (1970), where the Court upheld Florida's reciprocal notice-of-alibi statute, it expressly noted that it was not deciding the constitutionality of N.Y. Code Crim. Proc. § 295-1. Nor can it be said that the Wardius decision was clearly forecast by any trend of lower court decisions. Under such circumstances, legislative and judicial reliance on the New York notice-of-alibi provision was justifiable."

C. Effect of Retroactive Application

"Because that reliance began in 1935 when the provision went into effect, the retroactive application of Wardius in cases such as this would almost certainly result in substantial interference with the administration of justice in New York, not to mention other states with similar statutes, e.g., Oregon and Illinois."

D. Conclusion

"Since all three of the relevant criteria articulated by the Supreme Court indicate that Bush should not be allowed to benefit from retroactive application of the Wardius doctrine, his claim to the contrary is rejected."*

F. Disposition On Appeal To This Court

On appeal to this Court, counsel on both sides briefed the issue of retroactivity of Wardius on the merits and counsel for respondent-appellee, in addition to the above, briefed the issues of exhaustion, prejudice and harmless error. However, the panel which considered the case (Anderson, Feinberg and Timbers, C.J.J.) did not pass upon the merits, rather, the panel remanded the case to the District Court for further consideration as to whether or not petitioner suffered actual prejudice and, if so, whether or not such prejudice is constitutionally significant.**

G. Proceedings On Remand Before
The District Court

Counsel for both sides agreed to supplement the record on the issue of prejudice by way of affidavits in lieu

* Appendix C at 19-22.

** Appendix D at 1-2.

of holding an evidentiary hearing in light of the fact that one of the People's rebuttal witnesses is now deceased and a second no longer resides in New York State.

On October 31, 1978, the affidavits of Steven Lloyd Barrett, counsel for petitioner, and Arnold D. Roseman, Esq.,* former trial counsel for petitioner, were submitted to the District Court in an attempt to establish the petitioner's claim that he suffered constitutional prejudice by operation of an unconstitutional state statute.

Mr. Barrett's first affidavit sets forth no specific facts in support of petitioner's allegation of constitutional prejudice, rather Mr. Barrett's first affidavit, dated October 30, 1978, merely recites the procedural history of the case.

In the second affidavit submitted on behalf of the petitioner, Mr. Roseman stated that after being shown certain papers from the court files he "attempted to reconstruct some of my own thinking and actions which occurred some seven to eight years ago..." (Appendix C-2 at 1-2). Mr. Roseman's

* Appendix E1 and E2 respectively.

affidavit restates the history of the case alluding to, inter alia, the pre-trial challenges by him to the constitutionality of the then applicable notice-of-alibi statute.

Mr. Roseman in describing the effect of the Curtises' testimony on the defense stated:

"At the time Mr. Kimmins [defense investigator] made his preliminary investigation in this case, and in our private discussions, we had no idea that the two Curtises were to be called as rebuttal witnesses; had I been given such information at any time prior to trial, Mr. Kimmins, under my supervision and direction, would certainly have delved into certain areas testified to by the Curtises: (1) one that created a material discrepancy -- that they went to and were in Puerto Rico at the time of the homicide; (2) confirmation of Mr. Curtis' account of seeing petitioner in his bar in late August, to be gleaned from certain persons in the bar where he said he worked; and (3) checking other matters that the Curtises had testified to, but all of which could not possibly be investigated in the limited time for a spontaneous cross examination. It was difficult, if not impossible, to be able to immediately cross-examine two important rebuttal witnesses without a degree of intensive investigative preparation, as timewise, it could never serve as a predicate to attack a person's credibility on such short notice and in such limited time. In addition, other witnesses in the same bar in which Miller Curtis worked would have also been contacted, possibly found, and interviewed so as to be able to obtain some information to impeach Curtis." (App. E-2 at 4-5).

As to the defense's failure to seek a continuance at the conclusion of the Curtises' direct testimony,

Mr. Roseman stated that the possibility of requesting a continuance:

"may or may not have passed through trial counsel's mind... [I]f I had asked for a continuance then, after having at least partially attacked the credibility of the two Curtises with the then-meager information and material I had to work with, the defendant's case could easily have been jeopardized and the defendant made to look bad in the eyes of the jury were I to have asked for a continuance or an adjournment. Moreover, it would have served no useful purpose, because a short continuance for the purpose of looking into the backgrounds of these people and checking their direct versions could not have been accomplished in any period less than a week or ten days and my investigator could not have come up with anything worth utilizing in cross-examination." (Appendix E2 at 5).

Former Assistant Attorney General Kathleen H. Casey, in an affidavit dated November 8, 1978,* responded to the affidavits submitted on behalf of the petitioner. Ms. Casey's affidavit states that "counsels' affidavits dwell on probabilities of what might have been done had Roseman had two or three weeks notice of the names of the State's alibi witnesses." (Appendix F at 1).

* Appendix F.

Ms. Casey stated that it is "ingenuous for counsel to urge this Court that they were surprised when the landlord and landlady were called as rebuttal witnesses." (Appendix F at 1). Moreover, the State urged that the landlord would be the logical person to rebut petitioner's assertion that he was in New Orleans at the time of the murder.

Ms. Casey's affidavit presented the District Court with the following persuasive propositions (a) Mrs. Curtis' testimony and counsel's most effective cross-examination established Mr. Roseman's experience and skill as a trial attorney. (b) On re-direct the prosecutor discredited his own witness; therefore, if anything, Mrs. Curtis' testimony probably helped petitioner. (c) Mr. Roseman on cross-examination probed every area he felt necessary. (d) The trial recessed at the conclusion of Mr. Curtis' testimony and prior to the state's final rebuttal witness, thus affording defense counsel an opportunity to pursue the questions raised on cross-examination by counsel. (e) Everything possible was done to impeach the State rebuttal witnesses during cross-examination. (f) Counsels' affidavits are permeated with speculation.

Mr. Barrett submitted a second affidavit, dated November 22, 1978, in support of petitioner's contention that

he suffered constitutional prejudice by operation of an unconstitutional state statute. In said affidavit, counsel states that the passage of time had hampered petitioner's current ability to contradict the Curtises' testimony at trial. Indeed, Mr. Barrett candidly states that "the truth of the Curtises' account cannot be independently verified or contradicted." (Appendix G at 2)..

Mr. Barrett describes, in his affidavit, a telephone conversation had between counsel and Mr. Curtis. Said conversation did not unveil any information which would suggest that Mr. Curtis was mistaken regarding his whereabouts during August 1969. Counsel's affidavit also describes the unsuccessful efforts of a Legal Aid Society investigator to determine the dates of the Curtises' trip to Puerto Rico (Appendix G at 3). Appended to counsel's affidavit were officer McCarthy's notes reflecting a conversation had with Mr. Curtis. Said notes contradicted Mr. Curtis' trial testimony (Appendix G).

H. The District Court's Second Decision

In a memorandum and order dated August 7, 1979, Judge Pratt concluded after considering the record of the State proceeding, including the trial transcript and the affidavits submitted by counsel for both sides that "petitioner

did not suffer actual prejudice in connection with the testimony of the alibi rebuttal witnesses, and it is therefore unnecessary to determine whether any prejudice was of constitutional magnitude.*

After marshaling the evidence before him regarding the Curtises' trial testimony, Judge Pratt concluded that:

".... despite this assertion of prejudice, however, petitioner has not shown any evidence of actual prejudice... [a]s to Mrs. Curtis, petitioner has not pointed out any additional impeaching information he would have uncovered had she been identified in advance of trial, thus leaving us merely to speculate as to what the claimed prejudice might have been.

"Similarly, as to Mr. Curtis, petitioner points to not even one additional fact which would have been available at trial if advance identification had been made. Mr. Curtis gave a plausible explanation for telling the prosecutor he had been in Puerto Rico during part of the period that he testified petitioner was in New York. If petitioner now presented some evidence that Mr. Curtis was in Puerto Rico at that time, then prejudice would have to be assumed. But there is no such evidence." (Appendix H at 7-8).

* Appendix H at 1-2.

Moreover, Judge Pratt found that the petitioner should have anticipated that the prosecution would call his landlords to testify on the alibi issue.

The District Court also noted that petitioner did not request a continuance after the direct examination of the Curtises though their "testimony came well before the end of the trial." (Appendix H at 9).

Judge Pratt viewed the unanswered questions before him as not being directly related to the issue of guilt is innocence; rather, the District Court categorized said unanswered questions as focusing on collateral claim of alibi and credibility.* The court noted:

"....[F]or the jury to believe the rebuttal witnesses would not necessarily have led to a conviction, since the prosecution still had to prove the elements of the crime itself, not just the fact that the defendant was present in New York. Similarly, even if defense counsel were successful and the rebuttal witnesses were disbelieved, an acquittal would not necessarily have resulted, since the jury could have chosen to disbelieve the alibi witnesses as well (in this case, petitioner's family members and friends), and reached their decision on the other evidence in the case.

* Appendix H at 10).

"Finally, there were other factors in this case which the jury had to consider, not the least of which was a voluntary confession by the petitioner, admitted into evidence at the trial." (Appendix H at 10-11).

POINT I

PETITIONER HAS SO RADICALLY CHANGED HIS ARGUMENT BEFORE THIS COURT THAT HIS APPEAL SHOULD BE DISMISSED FOR FAILURE TO PRESENT HIS ARGUMENT TO THE COURT BELOW, IN PETITIONER'S FIRST APPLICATION, AND FOR FAILURE TO EXHAUST HIS STATE REMEDIES.

In petitioner's brief to this Court, he attempts to allege actual prejudice. The claim of actual prejudice was never raised throughout petitioner's state appeals,* nor was it raised by petitioner before the District Court prior to his first appeal to this Court.**

It is the respondent's position that petitioner suffered no prejudice by operation of New York's notice-of-alibi statute, see Point II herein. The fact that the issue

* See, State appellate briefs to Appellate Division and Court of Appeals lodged with this Court. See also, People v. Bush, 33 N Y 2d 921 (1973), motion to amend remittitur granted, 34 N Y 2d 537.

** Appendix C at 20.

of actual prejudice was not presented to the State courts and was never raised before Judge Pratt in the original petition, the issue is not properly before this Court.

The Supreme Court decisions in Picard v. Connor, 404 U.S. 270 (1971); and Pitchess v. Davis, 421 U.S. 482 (1975) confirm the statute's mandate requiring post-trial adjudication of the merits of every claim in a habeas petition before consideration may be given in Federal court. Indeed, this Court has consistently applied the rule of Picard v. Connor, supra, and required the petitioner to present the State courts the same claim he urges upon the Federal courts Wilson v. Fogg, 571 F. 2d 91, 95 (2d Cir. 1978); Cameron v. Fastoff, 543 F. 2d 971 (2d Cir. 1976); Fielding v. LeFevre, 543 F. 2d 1102, 1106 (2d Cir. 1977); United States ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1124 (2d Cir.), cert. den. 409 U.S. 1045 (1972).

The substance of the federal habeas corpus claim must be presented to the state courts. See United States ex rel. Aloi v. Arnold, 413 F. Supp. 1384 (S.D.N.Y. 1976). The murky references in petitioner's state appellate brief did not clearly present the State courts with the argument of actual prejudice which he is now presenting to this Court.

As was observed by the Court of Appeals for the Second Circuit in Wilson v. Fogg, 571 F. 2d 91, 94:

"In both Picard and United States ex rel. Nelson v. Zelker, supra, there were vague constitutional arguments raised in the state court but they were found insufficient fairly to focus the attention of the State court on an issue later squarely presented to the federal district court." (Emphasis added).

Petitioner's new claim of substantial actual prejudice* sufficiently changes his challenge to the effect on him of the Code of Criminal Procedure § 295-1 so that the claim cannot be construed to be the same claim brought to the attention of the State courts. Indeed, the state claim, never presented in more than two pages, appears to claim, at most, an inconvenience to counsel during trial. (It would be disingenuous for petitioner to claim that he did not expect the prosecutor to call rebuttal witnesses). Indeed, after the cross-examination of the People's rebuttal witnesses,

* Bush's claim is, in any event, without merit, see Point II, post. In that he now presents a new set of factual allegations to this Court, he must first present those facts to the State courts. Anderson v. Casscles, 531 F. 2d 682 (2d Cir. 1976); United States ex rel. Cleveland v. Casscles, 479 F. 2d 15 (2d Cir. 1973).

counsel claimed merely that he could have done a better job on cross-examination, but he hoped he "did a job" (655).

Not having presented his claim to the State courts or the Court below, petitioner is not now properly before this Court.*

POINT II

PETITIONER SUFFERED NO ACTUAL PRE-
JUDICE BY OPERATION OF NEW YORK'S
FORMER NOTICE-OF-ALIBI STATUTE.

In Wardius v. Oregon, 412 U.S. 470 (1973), the defendant, unlike petitioner here, was prevented from introducing any evidence to support his alibi defense since he had failed to comply with the Oregon statute by giving a list of his alibi witnesses to the prosecution. In holding that Due Process "forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants."

* Whether New York will entertain a collateral challenge to petitioner's conviction is, of course, "a matter of New York law to be decided by New York courts and not by federal court predictions of what stances those courts will take." Wilson v. Fogg, supra, at 95.

412 U.S. at 412, the court in Wardius stated that:

"It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state." 412 U.S. at 475.

The court, however, clearly issued a caveat: "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but cf. Brady v. Maryland, 373 U.S. 831 (1963)", 412 U.S. at 974 and does not not require a state to adopt a reciprocal discovery statute. 412 U.S. at 475. Wardius was awarded a new trial because of the "substantial possibility" that the preclusion of his alibi witnesses "infected the verdict". 412 U.S. at 479.

When petitioner's case came before the New York Court of Appeals, it found that the operation of New York's notice-of-alibi statute in petitioner's case "did not go to 'the very integrity of the fact-finding process'" 33 N Y 2d 923 since petitioner had not been precluded from presenting his alibi defense. Where a defendant had been precluded from presenting an alibi witness, the New York Court of Appeals was not reluctant to conclude that "[t]he due process standards...

sought to be applied retroactively 'profoundly and directly' affected the fact-finding process itself" and ordered a new trial. People v. Morales, 37 N Y 2d 262, 269 (1975).*

New York's distinction between preclusion cases and surprise witness cases is rational, reasonable and harmonious with the constitutional principles established in Wardius. If a petitioner is unable to substantiate his allegation of actual prejudice, in a surprise witness case (as petitioner herein) and if the testimony of the People's rebuttal witness did not infect the jury's verdict insofar as the testimony addresses a collateral issue as opposed to affecting the fact-finding process, it would serve no purpose and indeed work a great injustice to order new trials in said situations.

Judge Pratt on remand from this Court after considering the trial proceedings, including the transcript of the State trial found "that petitioner did not suffer actual prejudice in connection with the testimony of the alibi

Indeed, insofar as People v. Bush, supra, and not Wardius v. Oregon, supra, invalidated New York's notice-of-alibi statute, what petitioner really requests of this Court is not the retroactive application of Wardius, but the retroactive application of Bush. However, "[t]here is nothing in the Constitution which requires a state to make its decisions retroactive." United States ex rel. Bund v. LaVallee, 344 F. 2d 313 (2d Cir. 1965) cert. den. 382 U.S. 867 (1965).

witnesses, and it is therefore unnecessary to determine whether any prejudice was of constitutional magnitude." (Appendix H at 2).

Petitioner failed to unearth tangible evidence which would support the contention that he was surprised at trial by the People's rebuttal witnesses and unable to prepare and conduct an effective cross-examination of said witnesses.

Petitioner submitted three affidavits to the District Court in an effort to establish actual prejudice. As to the testimony of Mrs. Curtis, Judge Pratt found that:

"petitioner has not pointed out any additional impeaching information he would have uncovered had she been identified in advance of trial, thus leaving us merely to speculate as to what the claimed prejudice might have been." (Appendix H at 7).

As to the testimony of Mr. Curtis, the court held.

"petitioner points to not even one additional fact which would have been available at trial if advance identification had been made. Mr. Curtis gave a plausible explanation for telling the prosecutor he had been in Puerto Rico during part of the period that he testified petitioner was in New York. If petitioner now presented some evidence that Mr. Curtis was in Puerto Rico at that time, then prejudice would have to be assumed. But there is no such evidence." (Appendix H at 7-8).

Moreover, it is significant to note that petitioner did not submit an affidavit on his behalf nor did he submit affidavits from his roommates at the Curtis house.

In an effort to flush out the exact whereabouts of the Curtises during August and September of 1969, the petitioner's counsel utilized the services of an investigator. However, the investigation was fruitless, in that, no evidence was uncovered to give rise to an assumption or inference that Mr. Curtis lied about the exact dates of his trip.

Judge Pratt noted the contradictions of the Curtises' testimony at trial and decided that the written notes contradicting the Curtises' trial testimony were taken approximately two years after the incident.* The contradictions were harped upon by defense counsel and explained by Mr. Curtis from the witness stand.

This office pointed out in an affidavit to the District Court** and Judge Pratt noted in his decision that that petitioner did not seek a continuance after the direct testimony of the alibi witnesses. Petitioner's failure to request a continuance, precludes his claim or prejudice. See

* Appendix H at 6.

** Appendix F at 2.

Weatherford v. Bursey, supra, 429 U.S. 545 at 561 (1977); United States v. Krohn, 558 F. 2d 380 (8th Cir.) cert. den. 98 S. Ct. 207 (1977); Green v. Fogg, 422 F. Supp. 1034 (S.D. N.Y. 1976). Had he requested and been granted a continuance, he could have avoided his subsequent challenges to the statute, cf. Wainwright v. Sykes, 433 U.S. 72 (1977). Indeed, the failure to seek a continuance would lend support to the proposition that counsel was pleased with his cross-examination of the Curtises.

On the whole, the affidavits submitted on behalf of the petitioner are permeated with speculation. Those matters highlighted in said affidavits do not go to the issue of guilt or innocence, rather they address the issue of credibility which is a collateral issue.

Petitioner, thus, suffered no actual prejudice by the operation of New York's notice-of-alibi statute. Petitioner's argument that he was actually prejudiced by virtue of the fact that he was not provided the names of the prosecutor's rebuttal witnesses is a contention advanced without the proper factual support. Had no mention been made of the notice-of-alibi statute, the prosecutor would have been alerted to petitioner's alibi,* but the petitioner would have had no constitutional right to advance knowledge of the prosecutor's rebuttal witnesses.

* Petitioner testified before the grand jury and thereby alerted the prosecution to the fact that an alibi defense would be advanced at trial. Appendix C at 13.

POINT III

WARDIUS V. OREGON, SHOULD NOT BE
APPLIED RETROACTIVELY TO THIS CASE.

Assuming, arguendo, that it is proper to discuss this case in terms of the retroactivity of Wardius v. Oregon, supra, rather than People v. Bush, supra, since it was the latter that overturned New York's notice-of-alibi statute and not the former, the traditional retroactivity analysis leads to the conclusion that Wardius should not be applied. That was the conclusion in this case of both the New York Court of Appeals and the District Court on original application and on remand.

The District Court, when it first passed upon petitioner's claim, applied the three-prong test repeatedly used by the Supreme Court to decide whether a new constitutional ruling should be applied retroactively:*

"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old

* The District Court on remand from this Court only addressed the issue of actual prejudice and determined that petitioner suffered no actual prejudice.

standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'" District Court opinion, citing Michigan v. Payne, 412 U.S. 47, 51 (1973) (Appendix C at 20).

Accord Stovall v. Denno, 388 U.S. 293 (1967); Desist v. United States, 354 U.S. 244 (1969).

A. Purpose

As the District Court stated, "[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.' Williams v. United States, 401 U.S. 646, 653 (1971)." (Appendix C at 20-21) (Emphasis supplied). Ivan v. City of New York, 407 U.S. 203 (1972). The issue, however, is a matter of degree. Johnson v. New Jersey, 384 U.S. 719 (1966); Stovall v. Denno, supra.

As the Court of Appeals found, the rule here did not go to "'the very integrity of the fact-finding process'", 33 N Y 2d at 993. It merely went to the collateral issue of

two witnesses' credibility, which was vigorously attacked in any event.*

Judge Pratt noted the purpose factor did not favor retroactivity of the Wardius doctrine:

".... Had application of the New York notice-of-alibi rule led to Bush's abandoning his alibi defense, the purpose of the Wardius doctrine might well have dictated a new trial, since the trial court's truth-finding function arguably would have been substantially impaired. See United States ex rel. Hairston v. Warden, 407 F Supp 524 (ND ILL), rev'd on other grounds, 539 F2d 713 (CA7 1976); People v. Bush, *supra* (dictum). Here, however, Bush was not deterred from presenting his alibi defense. Moreover, no continuance was requested, and no specific prejudice was then or has subsequently been alleged. Under such circumstances, the application of the unconstitutional notice provision in Bush's case should not be assumed to have 'substantially' impaired the trial court's truth-finding functions. '[R]etroactivity is not required [merely] by a determination ... that the truth-determining process has been aided somewhat by the new standard....'". Gosa v. Mayden, 413 US 655, 680 (1973). (Appendix C at 21).

* It has been held that Brady v. Maryland, 373 U.S. 83 (1963) was not violated by failure of a prosecutor to turn over material about a witness' credibility and not relevant to the defendant's guilt. Klein v. Smith, 383 F. Supp. 485 (S.D.N.Y. 1975) affd. 559 F 2d 189 (2d Cir.) cert. den. 434 U.S. 987 (1977).

In light of the fact that there can be no question of the guilt of the petitioner, in that, petitioner confessed three times to the crime, coupled with the fact that petitioner has failed to establish any actual prejudice, it would serve no purpose and indeed would work a great injustice to disregard the sound reasoning and ruling of the New York State Court of Appeals and in its stead provide for complete retroactive application of the new rule as it was articulated in Wardius.

B. Reliance

The prosecutor here properly relied on New York's notice-of-alibi statute at a trial held more than two years prior to Wardius v. Orgeon, supra.

Petitioner's claim that Williams v. Florida, 399 U.S. 578 (1970) clearly foreshadowed the demise of the New York statute simply is not true. As the District Court correctly stated, (Appendix C at 21-22), the court in Williams specifically stated that it was not deciding the constitutionality of New York's notice-of-alibi statute, Code of Criminal Procedure § 295-1, 399 U.S. at 82, n.11.

A number of courts upheld non-reciprocal notice-of-alibi statutes after Williams v. Florida, supra, but before the decision in Wardius v. Oregon, supra; People v. Sherrod, 32 Misch. App. 183, 188 N.W. 2d 221 (1971); People v. Holiday, 47 Ill. 2d 300, 265 N.E. 2d 634 (1970); Commonwealth v. Phoenix, 217 Pa. Super. 121, 268 A. 2d 460 (1970); People v. Hairston, 10 Ill. App. 3d 678, 294 N.E. 2d 748, lv. to app. denied, 54 Ill. 2d 594 (1973); Commonwealth v. Jackson, 224 Pa. Super. 280, 303 A. 2d 519 (1973) rev'd after Wardius v. Oregon, 319 A. 2d 161 (Pa. Sup. Ct. 1974).

In United States ex rel. Snyder v. Mack, 372 F. Supp. 1077 (E.D. Pa. 1974), the court found that Williams v. Florida, supra, left undecided the validity of non-reciprocal notice-of-alibi statute. In Allison v. Wisconsin, 62 Wis. 2d 14, 214 N.W. 2d 437 (1974), cert. denied, 419 U.S. 1071 (1974), the court found that reliance on a pre-Wardius non-reciprocal notice-of-alibi statute was reasonable.

In addition, the Notice of Advisory Committee on Rules following 18 U.S.C.A. Rule 12.1 state that Williams v. Florida, supra, left unresolved the issue of non-reciprocal notice-of-alibi statutes.

Under these circumstances, it was not unreasonable for the trial court and the prosecutor to rely on an existing New York Statute. The District Court's finding that the "legislative and judicial reliance" on the New York statute was "justifiable" (Appendix C at 22) is clearly correct.*

C. Effect

A number of other states had non-reciprocal notice-of-alibi statutes prior to Wardius v. Oregon, supra, e.g. Illinois, Vermont, Wisconsin, Michigan and Pennsylvania. In almost all, the decision in Wardius was not held retroactive to non-preclusion cases like petitioner's.**

Although the number of cases that would be affected by retroactive application of Wardius cannot be ascertained easily, since an alibi is a common defense, the number could be great. New York has acted so that those cases where a defendant's alibi witnesses were precluded are guaranteed a retrial. People v. Morales, supra.

* Petitioner's claim that the prosecutor unfairly exploited the New York Statute does not bear scrutiny, since petitioner's alibi would have been known to it by other means and because the exact purpose of the statute is to prevent the concocting of a defense, see Williams v. Florida, supra.

** See Point III, sub-point "D", post.

As the District Court noted, New York's statute was in effect since 1935, retroactive application of Wardius in cases such as petitioner's, (where the crime occurred in 1969), a re-trial would be virtually impossible and would substantially interfere with the administration of justice. The effect here would be to set free someone duly convicted of a senseless and brutal murder.

Petitioner claims at p. 36 of his brief that "retroactive application may be restricted to cases which were on direct appeal on the date Wardius was decided." This proposition should not be adopted; it is illogical in light of the fact that the prosecutor had already relied upon pre-existing law.

D. The Decisions Of Other Courts

This writer's research has found that Wardius has been almost uniformly held non-retroactive in non-preclusion cases, i.e., where the defendant was not precluded from presenting his alibi defense.

In Mayer v. Moeykens, 373 Supp. 649 (D. Vt. 1973) (Waterman, J.) affd. 494 F. 2d 855 (2d Cir.) cert. den. 417 U.S. 926 (1974), the District Court refused to apply Wardius retroactively because the petitioner, like the petitioner here, did not show any material prejudice.*

* The issue was dropped on appeal.

In Rohl v. Wisconsin, 65 Wis. 2d 683, 223 N.W. 2d 567 (1974) Wardius was held not retroactive where there was no preclusion although the defendant did claim surprise by reason of the State's rebuttal witness whose testimony the defendant claimed he was unable to impeach.

Similarly, in Allison v. Wisconsin, supra, Wardius was held not retroactive since the "totality of the fact finding process", 214 N.W. 2d at 445, was not affected.

Kelsaw v. Oregon, 412 U.S. 947 (1973) after remand, 14 Or. A. 313, 513 P. 2d 516 (1973) and Cline v. Illinois, 414 U.S. 970 (1973), after remand, 19 Ill. App. 3d 446, 311 N.E. 2d 599 (1974), affd. 60 Ill. 2d 561, 328 N.E. 2d 534 (1975) were vacated and remanded for further consideration in light of Wardius, but in both cases alibi witnesses had been precluded from testifying.* United States ex rel. Hairston v. Warden, 407 F. Supp. 524 (N.D. Ill.) rev'd 539 F. 2d 713 (7th Cir. 1976) cert. den. 429 U.S. 1099 (1977) also was essentially a preclusion case.**

* In addition it appears that the retroactivity issue was not considered.

** In its "Unpublished Order Not to be Cited Per Circuit Rule 28", the Seventh Circuit in Hairston did not consider the retroactivity of Wardius "because it is clear from the state court record that petitioner was not harmed by application of the Illinois Statute."

Pennsylvania, without discussing the issue of retroactivity, so applied Wardius in a preclusion case, Commonwealth v. Contakos, 455 Pa. 136, 314 A. 2d 259 (1974), and where the rebuttal witness was merely an unknown witness to the crime, Commonwealth v. Jackson, 319 A. 2d 161 (Pa. Sup. Ct. 1974).

New York's approach to the retroactivity of Wardius, thus, is sound and is supported by other States. Wardius should not be applied retroactively where none of the defendant's alibi witnesses were precluded from testifying.

The only case cited by petitioner which would recommend retroactive application of Wardius in surprise witness cases was the District Court opinion in Jackson v. Fogg, 465 F. Supp. 177 (S.D.N.Y. 1978).

Judge Broderick granted petitioner's application for a writ of habeas corpus on two grounds (1) The pre-trial identification procedures were impermissibly suggestive and the identification testimony was irreparably tainted. On the basis of that testimony the conviction could not stand. (2) Petitioner sustained material substantive prejudice of constitutional dimensions by operation of the former New York State notice-of-alibi statute.

In his opinion, Judge Broderick discussed this case and the apparent position of this Circuit on the notice-of-alibi issue:

".... In denying the writ, the habeas court point out that at trial, defense counsel had not moved for a recess or a continuance to prepare a cross-examination and that Bush made no 'allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identity of these witnesses prior to their testimony.' ...

"The Second Circuit's apparent position -- that petitioners must at least demonstrate constitutionally significant prejudice in order to have Wardius apply retroactively -- was foreshadowed in this district in United States ex rel. McCrory v. LaVallee, 75 Civ. 6104 (S.D.N.Y. 1977), and in Green v. Fogg, 422 F. Supp 1034 (S.D.N.Y. 1976). In both cases the petitioner had failed to request an adjournment after the introduction of the rebuttal testimony. In Green, the court found that since the rebuttal evidence consisted solely of expert testimony contradicting the alibi witnesses' recollection of what the weather was like at the time in question, 'the error if there was any at all, was not prejudicial.'

"The gist of these cases, and of the Second Circuit's remand in Bush, is that petitioners seeking retroactive application of Wardius must allege and prove that the application of the defective statute prejudiced the defendant's case to a constitutionally significant degree. McCrory and Green suggest the caveat that the petitioners must have taken appropriate steps to alleviate any prejudice by requesting some measure of relief from the trial court, usually an adjournment or continuance." (Emphasis added. 465 F. Supp. at 191-192).

Judge Broderick concluded that petitioner suffered material and substantive prejudice. In Jackson, the petitioner, unlike petitioner Bush, requested and received two continuances. Moreover, petitioner in Jackson stated that had he known the identity of the rebuttal witnesses, petitioner would have handled the direct testimony of one alibi witness in a different manner or, in the alternative, may have proceeded with two instead of three alibi witnesses. Petitioner Bush failed to present Judge Pratt with evidence of a different or alternative defense strategy had counsel been alerted to the identity of the People's rebuttal witnesses, nor has petitioner Bush come forth with additional information which could have been used on cross-examination. Moreover, petitioner's trial attorney did not seek adjournment or continuance, thus giving rise to the inference that defense counsel was pleased and satisfied with the cross-examination of the Curtises. In addition, defense counsel rigorously cross-examined the Curtises and highlighted every discrepancy in their testimony. Therefore, viewing the case on the whole, petitioner Bush unlike the petitioner in Jackson has failed to establish that he suffered actual prejudice of constitutional significance.

This Court did not pass upon the notice-of-alibi issue in Jackson v. Fogg, 589 F. 2d 108 (2d Cir. 1978), rather,

this Court affirmed the District Court's opinion solely upon the issue of the tainted identification testimony. Jackson v. Fogg, supra, footnote 5 at 110-111. Respondent urges this Court to adopt Judge Pratt's analysis of the notice-of-alibi issue in deciding the issue of actual prejudice and retroactive application of Wardius. Judge Broderick in Jackson, supra at 193, held, that in his opinion (1) The purpose would be to overcome a substantial impairment of the truth-finding function of criminal trials (2) there was little reliance upon the old statute and that (3) the administration of justice would not be disrupted by retroactive application. Judge Pratt arrived at a totally different conclusion that (A) retroactive application would serve no purpose unless a person was precluded from presenting an alibi defense (B) the new Wardius rule was not forecast and, therefore, under such circumstances, legislative and judicial reliance was justifiable (C) as the reliance began in 1935 retroactive application would almost certainly result in substantial interference with the administration of justice in New York and other states who had similar statutes.*

Judge Pratt's analysis of the prejudice issue and the retroactivity issue is reasonable and just and warrants an affirmance of the District Court's decision.

* Appendix C at 20, 21, 22.

POINT IV

THE TRADITIONAL HARMLESS ERROR TEST
PRECLUDES THE APPLICATION OF
WARDIUS V. OREGON TO PETITIONER.

Assuming, arguendo, that Wardius v. Oregon, supra, should have been applied retroactively to petitioner, not doing so is harmless error beyond a reasonable doubt.

Petitioner has not challenged his confession in this Court. He could not do so seriously. The finding of the District Court sustaining the State Court's finding of voluntariness stands. The confession was complete. It leaves no room to doubt that petitioner committed the murder.*

Constitutional error can be considered harmless where the error was clearly harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967). Harrington involved a Sixth Amendment Confrontation Clause question. Yet, the court did find harmless error. A conviction derived in contravention of Wardius v. Oregon, supra, has been held harmless error. People v. Fields, 59 Ill. 2d 516, 322 N.E. 2d 33 (1974) cert. denied 423 U.S. 843 (1975).

* The confession is set forth at 321-25, 331-33, 423-34.

In Wardius v. Oregon, itself, the petitioner was entitled to a new trial because there was "a substantial possibility that [the Court's] error may have infected the verdict." 412 U.S. at 479. In light of petitioner's complete and full confession, any error at his trial could not have infected the verdict of guilt.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DIS-MISSING THE PETITION SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
February 19, 1978

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

JEANETTE MARCELINA being duly sworn, deposes and says
that she is employed in the office of the Attorney General
of the State of New York, attorney for Respondent-Appellee
herein. On the 19th day of February , 1980 , she served
the annexed upon the following named person :

The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007

Att.: Steven Lloyd Barrett, Esq.

Attorney in the within entitled appeal by depositing
a true and correct copy thereof, properly enclosed in a post-paid
wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that purpose.

Sworn to before me this
19th day of February , 19 80

Nancy B. Brase
Assistant Attorney General
of the State of New York

Jeanette Marcelina